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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

vs.

DRUGGISTS MUTUAL INSURANCE COMPANY, and
DISCUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

BRIEF OF APPELLEES

Druggists Mutual Insurance Company, and
Discus Prescription Drugs, Inc.

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SUMMARY OF THE ARGUMENT

I

The Missouri Supreme Court upheld the gender-based classification in Missouri's Workmen's Compensation Statute which affords a conclusive presumption of dependency to widows for obtaining death benefits because of the death of her spouse by accident, and not to widowers unless they are physically or mentally incapacitated because the Court found that Missouri's General Assembly assured benefits to widows in order to alleviate economic hardship confronting a woman, upon the death of her spouse, a hardship more pronounced for

women than for men. And the Missouri Court reasoned that assuring entitlement to widows substantially achieved the legislature's objective.

The Court believed that the legislature intended to favor married women, including wage earning married women, rather than discriminate against them. A woman's economic disadvantage is apparent when her earning capabilities are compared with a man's. For two decades, the median income of women has been approximately sixty percent of that earned by men.

The Missouri Court's decision followed and relied upon the decision of this Court in *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); and *Califano* v. *Webster,* 430 U.S. 313 (1977).

II.

The Missouri Court believed that the purpose and basis for the classification under Missouri's Workmen's Compensation Act differed from the purpose and basis of the classification under the Social Security System and for this reason the cases of *Califano* v. *Goldfarb,* 430 U.S. 199 (1977) and *Weinberger* v. *Wiesenfeld,* 420 U.S. 635 (1975) are distinguishable.

The Workmen's Compensation Act is not intended to be a system of blanket social insurance but is intended to compensate employees and their dependents for *economic loss* caused by an accident arising out of employment. The System does not tax female wage earners and yet deprive their dependents of benefits as did the Social Security System. The compensation benefits are financed solely by the employer, without contribution by the employee.

The female wage earner's dependent is given benefits when the dependent suffered actual economic loss because of his spouse's death. The law intended no more, especially at the expense of the employer. The Social Security Statute required a

husband to show that one-half of his support came from his wife. Thus, unless his wife had earned three times what he earned, a widower was not entitled to benefits under the Social Security Act.

III.

The classification which presumes that a widow is dependent upon her husband affords a widow both procedural and substantive advantages.

The legislature in its wisdom determined that children under the age of 18, wives, and husbands mentally or physically incapacitated, were those persons who should presumptively be dependent and therefore in "need of aid or support". In each of the classifications, children, widows and widowers, there will be those who are not actually dependent. However, the presumption does save the state the necessity of numerous determinations of dependency and it assures prompt payment of benefits to dependents of those killed in industry. Such imperfect classifications do not violate the Equal Protection Clause where the classification has a reasonable basis. *Weinberger* v. *Salfi,* 422 U.S. 749, 769 (1975); *Califano* v. *Boles,* 61 L.Ed.2d. 541, 555 (1977).

Substantively, the widow's award is worth more when she does not have to litigate the question of dependency. The presumption also assures benefits to a wage earning widow even though she is only partially dependent upon her husband, as where she earns as much as 38.8% of the family's income and would if not afforded the presumption be awarded only partial benefits.

The abstractions that the presumption of dependency is "freighted * * * with the baggage of sexual stereotypes", denies women independence and causes them to be "clouded and overshadowed" by men, or causes "invidious discrimination" state only broad generalities and absolutisms. Such statements con-

demn legislation which in reality serves the needs of women today, without providing any assurance that upon invalidation of the statute, the System will adequately provide for widows. The position which suggests that the married woman (widow), including married women wage earners, can and should shift for themselves is impersonal, impractical and detached from the real world and how men and women are treated in the job market.

The Missouri legislature struck a delicate economic balance in deciding the amount of compensation it would require employers to pay upon injury or death of employees. Widowers are not deprived of benefits upon proof of dependency. The Missouri Court believed that the substantial difference in economic standing of working men and women justifies the advantage that Section 287.240(4)(a) gives to widows. This Court should adopt the Missouri Supreme Court's position and give the same deference to the Missouri Statute.

ARGUMENT

I. The Missouri Supreme Court Properly Found That The Classification In The Missouri Workmen's Compensation Statute, Section 287.240 (4)(a) R.S.Mo., 1976 Supplement, Which Conclusively Presumes That Widows Are Entitled To Benefits But Which Does Not Afford The Same Presumption To Widowers Unless They Are Physically Or Mentally Incapacitated Does Not Violate The Equal Protection Clause Of The Fourteenth Amendment To The Constitution Of The United States For The Classification Serves The Important Governmental Objective Of Cushioning The Financial Impact Of Spousal Loss For Widows, The Sex For Whom That Loss Imposes The More Serious Burden.

The Missouri Supreme Court determined that the gender-based classification of Missouri's Workmen's Compensation Statute which affords a conclusive presumption of dependency to a widow for obtaining workmen's compensation benefits for the death of her spouse but requires a widower to prove actual dependency (unless he is mentally or physically incapacitated) does not violate the Equal Protection Clause of the United States and Missouri Constitutions because assured payments of death benefits to a widow serves an important governmental objective and substantially achieves the objective. The conclusive presumption alleviates the economic hardship confonting a widow resulting from the death of her spouse. The Supreme Court of Missouri found that the economic hardship a woman suffers upon that event is more immediate and pronounced than that suffered by a man (Jurisdictional Appendix A-10, A-11). Further, the Missouri Court found that this hardship was real and supported by empirical data. *Kahn* v. *Shevin*,416 U.S. 351, 354, 355 (1974); Juris App., A-4, A-11. See Bureau of Labor Statistics, U.S. Department of Labor, U.S. Working Women: A Databook, Bulletin 1977, Tables 35-39, 41 (1977).[1]

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[1]These tables are reproduced in the Appendum, pp. A-1 to A-7.

The Supreme Court of Missouri concluded:

> The widower is not deprived of death benefits upon the compensable death of his wife but is entitled to same upon proof of dependency. In our opinion, the substantive difference in the economic standing of working men and women justifies the advantage that Section 287.240 (4)(a) administratively gives to a widow." [Juris. App. A-11]

In reaching this result, the Missouri Court followed the decision of this Court in *Kahn* v. *Shevin,* supra; *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975) and *Califano* v. *Webster,* 430 U.S. 313 (1977) which decisions uphold the validity of legislation that treats men and women differently when the classification by gender served important governmental objectives and was substantially related to the achievement of those objectives. In *Kahn* v. *Shevin,* supra, the Florida Statute granted a tax exemption to widows and not to widowers for the reason that the differing treatment of widows was intended to further the state policy of cushioning the financial impact of spousal loss upon the sex for which the loss imposes the heaviest burden. 416 U.S. at 353.

The brief of Amicus Curiae, p. 40, attempts to distinguish *Kahn* v. *Shevin* on the basis that the exemption did not discriminate against the woman wage earner as the workmen's compensation classification does. However, this distinction is not valid. The exemption does discriminate against all wives, including wage earning wives, who predecease their husband, for the wife's estate after it passes to her widower, is of less value to her widower since it is not entitled to the annual tax exemption, than is the estate of a man who predeceases his spouse who may claim the property tax exemption. This Court upheld the discriminatory effect of the statute as not violative of the equal protection clause, even though it granted the exemption to independently wealthy widows who were not in need of a tax

break and although it denied the exemption to widowers who were needy. [Missouri's Workmen's Compensation Statute works with an even hand and grants benefits to those men (widowers) who are actually in need of support.]

In *Califano* v. *Webster,* 430 U.S. 313 (1977), this Court held that the provisions of Section 215 of the Social Security Act (42 U.S.C.S. § 4015), which permitted old age insurance benefits obtained by women reaching the age of 62 before 1975 to be greater than those obtained by men of the same age with the same earning record, did not violate the equal protection clause of the Fifth Amendment, since the more favorable treatment of female wage earners served the purpose of compensating women for past economic disabilities suffered by them.

Similarly, the different treatment of the sexes, under 10 U.S.C.S. § 6401(a), which required mandatory discharge of a woman line officer for want of promotion after thirteen years of commissioned service, discriminated against male officers who under 10 U.S.C.S., § 6382(a), were mandatorily discharged if passed over for a promotion two consecutive times. This Court held that the Fifth Amendment Equal Protection Clause was not offended, since the classification rationally compensated women line officers who had less opportunity for promotion than male officers. This Court reasoned that permitting longer periods of tenure for women officers was consistent with providing women with a fair and equal advancement program. *Schlesinger* v. *Ballard,* 419 U.S. 498, 508 (1975).

The decision of the Missouri Court in the present case was not in opposition to the decisions of this Court but in fact acknowledged and followed them. In reaching this result, the Missouri Court applied the "substantial relationship test", the test used by this Court in *Califano* v. *Webster,* supra, 430 U.S. at 316, 317; *Orr* v. *Orr,* 440 U.S. 268, 59 L.Ed.2d 306, 319 (1979) and *Califano* v. *Westcott,* 61 L.Ed.2d 382, 393 (1979).

In basing its decision upon the consideration that the Missouri Legislature, when it enacted the statute creating the presumption in favor of widows, intended to favor women rather than discriminate against them, the Missouri Supreme Court noted that the data available to the General Assembly of Missouri at the time the legislation was enacted supported the concept that a widow was more in need of total benefits upon her husband's death without drawn-out proceedings to determine the amount of benefits than was a man. It was also clear to the Court that a woman's needs continue to the present. (Juris. App., A-10).

The statistics available to the Missouri Court and to this Court, include not only those cited in *Kahn* v. *Shevin,* supra, 416 U.S. at 354, 355, but those available in more recent Department of Labor publications. And those statistics show that it is the married female wage earner, who appellant claims is most sorely disadvantaged by the presumption, who also suffers the economic hardship when her husband dies. In 1976, the median personal income for married women whose husbands were present in the home was $3800.00. The median income of husband-wife families was $16,200.00 and *rose* to $18,700.00 when the wife was in the labor force. Bureau of Labor Statistics, U.S. Department of Labor, Employment in Perspective: Working Women, Report 547 (Third Quarter 1978). In 1975, in families where the wife was employed, the median percent of family income accounted for by the earnings of the wife was 26.3%. In instances where the wife worked on a fulltime basis, the median percent of family income accounted for by her earnings was 38.8%. In instances where the wife worked on a part-time basis or fulltime for one to 26 weeks a year, the median percent of family income accounted for by her earnings was 11.8%. U. S. Working Women, supra, Table 41. See also, Bureau of Labor Statistics, U. S. Department of Labor, Marital and Family Characteristics of Workers, March 1977, Labor Force Report 216, Table 3, 4 p. 53; Supplementary Table D, p. A-15, Table N, pp. A-42, 43.

The statistics also show that married women earn less than their never married sisters. The reason for this may be that married women have had part of their working lives interrupted by marriage and child bearing and that married women are in fact helping their husbands earn his wages, which in turn tend to be greater than those earned by never married men and women. Sowell, Status Versus Behavior, 1979 Wash. U.L.Q. 179, 184, 185.

In 1976, of the 1,846,000 women in Missouri, 831,000 or 48.7% were employed in either a fulltime or part-time basis, and correspondingly, 51.7% were not employed. Of the 1,632,000 men in Missouri, 1,228,000 or 75.3% were employed. Statistically then more men are actively engaged in gainful employment than women, and are therefore less likely to suffer the impact of lost wages caused by the death of their spouse. In addition, the disparity between men and women is reflected by the higher unemployment rate among women. In 1976, the rate of unemployment for women in Missouri was 7.4% and for men 5.4%. Bureau of Labor Statistics, U.S. Department of Labor, Geographical Profile of Employment and Unemployment, Report 504, Table 3 (1977). And traditionally, Missouri's women are employed in those occupations which pay lower salaries. For instance, 57.8% of women employed in Missouri were either clerical workers or service workers. Only 4.5% were managers, or administrators. 14.2% of men employed worked as clerical workers or service workers, and 12.7% were administrators or managers. Thirty six percent worked at crafts or kindred occupations or were operatives, transportation or otherwise. Geographical Profile, *supra,* Table 6. In May, 1976, the median usual weekly earnings for women in the U.S. generally, employed as clerical workers, was $147.00, for men $228.00. The median usual weekly earnings for women employed as service workers was $109.00 and for men $170.00. So that even in the occupations where women are most numerous, their earnings are 64% as much as men's earnings in

the same occupation. The median weekly income for male operators was $202.00, for females $121.00. The weekly earnings of women administrators and managers was $187.00, while men averaged $320.00 per week. U.S. Working Women, *supra,* Table 36. More generally, the median annual earnings of year-round fulltime female workers in 1975, was $7,504.00 and that of men was $12,631.00. U.S. Working Women, *supra,* Table 39.

In a more recent publication, the Bureau of Labor Statistics noted:

> In 1977, women who worked year round, full time (50 to 52 weeks, 35 hours or more per week) earned, on average, about 60 cents for every dollar earned by their male counterparts. Women's median earnings were $8,6000 compared to $14,600 for men.
>
> For more than 2 decades, the earnings differential between working men and women has stayed in the narrow 58 to 63 percent range despite the enormous influx of women into the labor force. During the last 25 years, the proportion of women in the population who work has risen from 34 to 50 percent, and now more than 4 of every 10 workers are women. One reason that no real change has occurred in the earnings gap is that a substantial proportion of women are still concentrated in the traditional, low-paying female jobs—about 6 out of 10 women are employed in clerical, service, and retail sales jobs. Another reason is that a large number of women now entering the work force are employed at low-paying entry-level jobs, and temporarily, their earnings may be holding down the average earnings of all women.
>
> Bureau of Labor Statistics, Department of Labor, Employment in Perspective: Working Women, Report 547, (Third Quarter 1978).

II. The Missouri Supreme Court Properly Determined That Califano v. Goldfarb Does Not Control Here Because Missouri's Workmen's Compensation Law (1) Was Not Intended to Provide a System of Blanket Social Insurance, As Was the Social Security System; (2) Did Not Unfairly Tax Mrs. Wengler for Benefits Her Spouse Did Not Receive and (3) Unlike the Social Security System, Provided Benefits For Needy Widowers.

The Missouri Supreme Court distinguished this case from the case of *Califano* v. *Goldfarb,* 430 U.S. 199 (1977) because the circumstances of this case materially differed from the gender-based distinction created by the Social Security Act. The Social Security Act allowed a widow to receive benefits based upon earnings of her deceased husband without showing actual dependency but required a widower to prove he was receiving at least one-half of his support from his deceased wife to qualify for benefits upon her death.

First the Missouri Supreme Court noted that the death benefits provided for by Missouri's Workmen's Compensation Statute was not intended to provide blanket survivorship benefits. The Workmen's Compensation Statute was not deemed to be a system of social insurance as was the Social Security System. Juris. Appendix A-8, A-9; *Weinberger* v. *Wiesenfeld,* 420 U.S. 635, 644 (1975). Workmen's compensation benefits are substitutional to the common law rights and remedies in favor of the injured employee for his or her dependents for accident which results in the course of employment. Juris. Appendix A-3, A-9; *Todd* v. *Goostree,* 493 S.W.2d 44 (Mo. App. 1973). The Compensation Act is designed to compensate only for *economic loss* to the worker or his dependents suffered because of lost wages due to disability or death and is not designed to compensate for pain and suffering alone or for loss of spousal services or consortium. Blair, *Reference Guide to Workmen's Compensation Law,* §11.01.

Based upon this understanding of Missouri's Workmen's Compensation Law, appellant Wengler's position is untenable. He cannot claim that he was denied a benefit which was his due.[2] He has not suffered any economic loss as the Workmen's Compensation Act views loss, because his wife had never contributed any of her earnings to his support. (Division Workmen's Compensation Commission, Tr. 3).

The Missouri Court also believed that the Social Security System was different from Missouri's Workmen's Compensation Laws in that the Social Security System was generally based upon mandatory contributions from past wage earnings of the employee. (Juris. App. A-8, A-9). The Workmen's Compensation Statute prohibits employee contributions to the System. Section 287.290, Mo. R.S. The employer is solely responsible for financing the System. Section 287.280-.300. In *Califano* v. *Goldfarb,* Mrs. Goldfarb had directly contributed her wages to finance the Social Security System and her husband was entitled

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[2]At pages 27-29 of their Brief, Amicus Curiae compare the Workmen's Compensation "substitutional" remedy in case of death with the rights created by Missouri's Wrongful Death Act. Mo. Stat. Ann. §537.090 (1977 Supplement). The Workmen's Compensation remedy limits damages paid by the employer in the case of death to recovery of funeral expenses, §287.240(1) and to payment to the dependent of the employee of death benefits based upon a percentage of the employee's average weekly earnings. Mo. Stat. Ann. §287.240(2). The death statute permits recovery for "pecuniary loss" which includes services the deceased would have rendered his surviving spouse. The Workmen's Compensation Act provided for compensation for accidents whether or not the employer was at fault in exchange for reduced measure of damages. Missouri's Workmen's Compensation Act affords Wengler no compensation because he suffered no economic loss, not because the Act discriminates against him because of his sex. The statement made by amicus curiae at page 29 of their brief that "Missouri Compensation substitute is in fact no substitute at all when a Ruth Wengler dies" is true. However, the inference drawn is incorrect. It is no "substitute" because the Act does not provide for compensation where there is no economic loss, not because the Act discriminates unconstitutionally.

to recover nothing. 430 U.S. at 206, 207. Mrs Wiesenfeld had also contributed wages. *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 645. This Court was understandably indignant when the System precluded protection for the wage earner's spouse but also deprived the wage earner of a portion of her earnings in order to contribute to a fund out of which similar benefits were paid to others. In the present case, Mrs. Wengler paid none of her wages into the System. There can be no outcry that she was "unfairly" discriminated against for this reason.

The statement in Amicus Curiae's Brief, p. 31, that the Missouri Supreme Court thought it proper to disregard the rights of a female worker when she did not contribute to the plan is inaccurate. The Supreme Court of Missouri made no reference to whether or not it believed that workmen's compensation benefits were a part of an employee's total compensation package. The Court noted that the employee contribution element, present and relied upon in *Goldfarb* and *Weinberger,* was not a consideration in Wengler's case. Furthermore, since the legislative intent was to compensate workers for economic loss suffered by their dependents, Mrs. Wengler received for her dependent the degree of protection which the Missouri Legislature intended to extend to all workers. In any event, even if this Court concludes that the Statute discriminates against female wage earners because their fringe benefits are less than those afforded male wage earners, the classification is permissible since the statutory classification which treats men and women differently serves the important governmental objective of cushioning a male worker's dependent from spousal loss which is more immediate and pronounced than that suffered by a female worker's dependent and because the classification is substantially related to the achievement of that objective. *Califano* v. *Webster, supra.*

There is an additional difference between the statutory classification under §287.240(4) and the classifications contained in the Social Security Act. Under the Social Security Act,

Mr. Goldfarb had to show that he had received one-half of his support from his wife at the time of her death. Under Missouri's Workmen's Compensation Act, a widower who in fact suffers loss of support because of his wife's death due to a job-related injury, is entitled to compensation. Section 287.240(2) and (3) Mo. R.S.; *Gantner* v. *Fayette Brick & Tile Co.*, 236 S.W.2d 415 (Mo. App. 1951); *Dykes* v. *Thornton*, 282 S.W.2d 451 (Mo. 1955); 302 S.W.2d 304 (Mo. 1957).[3]

The remaining cases cited by appellant's brief, p. 13, *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); and *Califano* v. *Westcott, supra*, in support of his contention that the widows presumption of dependency denies him the equal protection of the law are distinguishable from this case for the discriminatory treatment in each of those cases did not in any way compensate a female for past disparate economic treatment nor did the objective asserted meet the "substantial relationship test". In *Frontiero, supra*, the Court held invalid an act of Congress relating to military pay which allowed a male member of the military service to claim his wife as a dependent without any showing of such a fact, but which required a female member to show that her husband was dependent upon her for more than one-half of his support before she could claim benefits. The consequences of spousal dependency were in-

[3]The brief of Amicus Curiae, p. 15, states that the husband will go remediless so long as he has the means to support himself. It is true that a "dependent" who is physically capable of supporting himself or herself but makes no effort to do so but just relies upon the employee for support and lives in idleness is not entitled to death benefits even though he or she may been supported in fact by the employee. *Ricks* v. *H.K. Porter Inc.*, 439 S.W.2d 164 (Mo. 1969). However, when the employee pools his funds with other members of a household or pays a part of his salary for their support, those relying upon these contributions may be a total or partial dependent. See *Faccone* v. *Busy Bee Candy Co.*, 216 S.W.2d 112 (Mo. App. 1948); *Gantner* v. *Fayette Brick & Tile Co., supra*. Thus the needy widower who was supported in part or in whole by his wife is entitled to benefits.

creased fringe benefits in the form of quarters allowance and medical and dental benefits. In the *Frontiero* case, the disparate treatment between male and female personnel in no way compensated a female for past disparate economic treatment. Additionally, the government in *Frontiero* conceded that the sole purpose of the differential treatment was administrative convenience, and that it saved the government money not to have to determine whether males' spouses were dependent. 411 U.S. at 688-9. This Court consequently held that achieving administrative convenience was not based on a fair and substantial relationship to the object of a legislation, i.e. to provide fringe benefits to members of the uniform services in order to establish a compensation pattern which would attract career personnel through re-enlistment. 411 U.S. at 690, n. 25. This Court stated, 411 U.S. 690:

> We therefore conclude that, by according differential treatment to male and not female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

The same analysis can be applied to *Califano* v. *Westcott*, 61 L.Ed.2d 382, 99 S.Ct. 2655 (1979). In *Westcott*, the statute provided benefits to families whose dependent children had been deprived of parental support because of the father's unemployment, but did not provide such benefits when the mother was unemployed. The statute tended to perpetuate economic disadvantage to women, and did not compensate them for the disparity between the economic capabilities of a man or a woman. In *Reed* v. *Reed, supra*, the Idaho statute which gave preference to males as administrators of decedents' estates in no way compensated or benefited women for past or present economic disparate treatment.

In *Orr* v. *Orr*, 440 U.S. 268, Alabama's statute which provided that husbands and not wives may be required to pay alimony upon divorce discriminated against those males who because of their financial circumstances were in need of support. Missouri's Workmen's Compensation Law compensates all widowers who are mentally and physically incapacitated from earning a living, and those who can actually show that they were dependent in part or in whole upon their wife for support. Entitlement is not denied needy males under the Missouri law while it was denied needy males under the Alabama statute.

III. The Procedural and Substantive Advantage Afforded Widows by Missouri's Workmen's Compensation Act, Assuring Widows, Including Those Earning Wages, of Full Benefits, Serves the Needs of Women Today Without Perpetuating Disadvantage to Them and Also Fosters the State's Concern for Avoiding the Expense and Burden of Litigating the Question of Dependency in Each Case Involving Widows.

The Missouri legislature was faced with the problem in distributing benefits to those who actually suffered economic loss, of defining the classes of persons who would be entitled to receive benefits. When it selected minor children under the age of 18, Section 287.240(4)(b) R.S.Mo., 1976 Supplement, wives, and husbands mentally and physically incapacitated, as those persons who would be presumptively dependent and therefore in "need of aid or support", it included in such classifications children, widows and physically and mentally incapacitated widowers, who were not in fact dependent upon the wage earner. These classes do not perfectly reflect actuality of dependence but it does save the state the necessity of numerous determinations of dependency and it assures prompt payment of benefits to dependents of those killed in industry. See Cohn, R. Robert, History of Workmen's Compensation Law, 15 Vernons Annotated Statute 17, 24.

A state does not violate the Equal Protection Clause simply because the classification made by its laws are imperfect. If the classification has a reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or results in some inequality. (Juris. App. A-6, A-7; *Weinberger* v. *Salfi*, 422 U.S. 749, 769; *Califano* v. *Boles*, 61 L.Ed.2d 541, 555 (1979).

The benefits afforded widows under the Act are substantive as well as procedural. A widow's award is worth more to her when she does not have to litigate the question of dependency. Schweitzer, Preparation Manual for Accident Cases, pp. 64, 5, (1935). Further, the Act assures benefits to a widow even though she is only partially dependent upon her husband. Full benefits are assured to widow wage earners who earn as much as 38.8% of the family's income, the median for married women employed fulltime[4] who otherwise might have been entitled only to partial benefits. See *Gantner* v. *Fayette Brick & Tile Co.*, *supra.*

Should this Court conclude that §287.240(4)(a) unconstitutionally discriminates against widowers and/or female wage earners, and remand this case to the Supreme Court of Missouri for disposition, then it appears certain that the Supreme Court of Missouri will invalidate the statute, as the California court did in *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 563 P.2d 849, (1977), rather than extend its benefits to widowers.[5] The Missouri Court in choosing between the alter-

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[4]See U.S. Working Women, Table 41.

[5] Amicus Curiae infers that Missouri's Supreme Court may extend benefits to widowers because death benefits are a relatively insignificant cost in comparison with the total amount paid in compensation benefits. Brief, Amicus Curiae, p. 53, n. 39. The amounts are not insignificant to Missouri employers who are the sole financiers of the plan. The total amount paid in death benefits for a stated year must be revised annually to reflect the true amounts paid to date in death benefits for that year. The $119,844.71 which amicus curiae indicates

native of extension or invalidation must "accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole". *Califano* v. *Westcott, supra,* 61 L.Ed.2d at 396 (concur in part, dissent in part); *Welsh* v. *United States,* 398 U.S. 333, 365-366 (1970). The Missouri Court has already indicated that it believes that the purpose of the Workmen's Compensation Act was not to provide blanket "social insurance". The basis for recover is economic loss.[6] (Juris. Appe., A-9)

In the event of invalidation, widows who earned 38% of the family income may well be entitled to only partial payments and this after extended litigation over the amount of support her husband contributed to her during his lifetime. Her burden will be to show by substantial evidence that she was dependent. *Dykes* v. *Thornton, supra.*[7]

Amicus Curiae assert that the presumption of dependency is "freighted * * * with the baggage of sexual stereotypes," (Brief, Amicus Curiae, pp. 10, 13), and denies women independence and causes them to be "clouded and overshadowed" by men. (Brief, Amicus Curiae, p. 14) Judge

was paid in death benefits in 1974 was just the tip of the iceberg. The 1978 revised figures for 1974 indicate that there were 150 compensated deaths in Missouri; benefits paid out through July 1978 for the 150 deaths attributable to accidents which occurred in 1974 amounted to $703,901.99, while $34,137,456.94 total compensation were paid for 1974. As of July 1978, statistics show that there were 148 deaths from accidents which occurred in 1976, and $801,163.24 paid out in benefits, while $46,020,248.17 in total benefits were paid for that year. Missouri Department of Labor and Industrial Relations, Annual Report, Fiscal Year 1978, pp. 22, 23. Undoubtedly, these figures and the figures shown for 1977 will be adjusted upwards again as employers continue to pay weekly death benefits to already determined claims, and as injuries occurring in one year results in death in later years.

[6]See page 12 for discussion of the rationale upon which payments are made.

[7]Amicus Curiae, Brief pp. 15-17, believes that the burden placed on widowers to show dependency is stringent.

Bardgett in his opinion, (Juris. Appl., p. A-9) noted that whenever statutes are declared unconstitutional they are accused of causing "invidious discrimination" or of being "archaic and overbroad generalizations which have little relationship to present reality". These very abstractions and broad generalities condemn legislation which in reality serve the needs of women today as much as it did in 1927 when this legislation was passed. Freund notes that the twin vices of abstractness and absolutism can make our thinking unresponsive to reality. Freund, The Philosophy of Equality, 1979 Wash. U.L.Q. 11, 21. The Court should not allow broad claims of "sexual stereotyping" to cause it to lose sight of the fact that women economically are not the equal of men. The statistics overwhelmingly support the notion, that except for the fortunate few, women still suffer disproportionately for spousal loss. Appellants have made no showing that those women who are protected by the conclusive presumption do not need the protection and that they will not be placed in serious economic difficulty by invalidation of the statute.

As the Supreme Court of Missouri noted "the legislature must strike a delicate economic balance in deciding the amount of compensation it will require employers to pay upon injury to or death of employees." Jurisdictional Statement, A-11. In Missouri, the widower is not deprived of benefits upon proof of dependency. The Missouri Court believed the substantial difference in economic standing of working men and women justifies the advantage that §287.340(4)(a) gives to widows.

This Court has traditionally reasoned that it will not substitute its social and economic belief for the judgment of the legislative body. *Kahn* v. *Shevin,* supra, 416 U.S. 356, n. 9, citing *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963). Appellee respectfully requests that the Court give the same deference to §287.240(4)(a) and to the General Assembly of the State of Missouri.

CONCLUSION

The Supreme Court of Missouri properly found that the classification created by Section 287.240(4)(a) of Missouri's Workmen's Compensation Statute is not violative of the equal protection clause of the United States Constitution. The classification created by the statute which treats men differently in assuring death benefits to widows and not to widowers, is based upon the fair and substantial relationship to the legislative objective of assuring death benefits to widows, the sex for whom the loss of spousal earnings historically and to the present day has had the most disproportionate burden because of prior overt economic discrimination by a male dominated culture.

In Missouri, the widower is not deprived of death benefits but is entitled to benefits upon proof of dependency.

For the reasons stated above, the decision of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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APPENDUM

APPENDUM A

Bureau of Labor Statistics, U. S. Department of Labor, U. S. Working Women: A Databook, Bulletin 1977, (1977)

Table 35

Median usual weekly earnings of full-time wage and salary workers by sex, 1967-76

Year	Usual weekly earnings				Women's earnings as percent of men's
	In current dollars		In 1967 dollars		
	Women	Men	Women	Men	
May of:					
1967.....	$ 78	$125	$78	$125	62
1969.....	86	142	79	130	61
1970.....	94	151	81	131	62
1971.....	100	162	83	134	62
1972.....	106	168	85	135	63
1973.....	116	188	88	143	62
1974.....	124	204	85	140	61
1975.....	137	221	86	138	62
1976.....	145	234	86	138	62

Table 36
Median usual weekly earnings of full-time wage and salary workers by sex and occupation and industry group, May 1976

Occupation and industry group	Usual weekly earnings: Women	Men	Women's earnings as percent of men's
OCCUPATION			
Professional-technical ...	$218	$299	73
Managerial-administrative, except farm	187	320	58
Sales	111	244	45
Clerical	147	228	64
Craft	149	243	61
Operatives, except transport	121	202	60
Transport equipment operatives	(1)	216	—
Nonfarm laborers	121	166	73
Service.....	109	170	64
Farm	107	122	88
INDUSTRY			
Agriculture.....	$113	$129	88
Construction	167	244	68
Mining	(1)	280	—
Manufacturing.....	137	231	59
Durable goods	148	235	63
Nondurable goods...	127	222	57
Transportation and public utilities	190	270	70
Wholesale trade	148	240	62
Retail trade.....	113	188	60
Finance, insurance, and real estate	144	270	53
Private houshold	66	(1)	—
Miscellaneous services ...	160	224	71
Public administration	173	269	64

[1] Median not shown where base is less than 75,000.

Table 37

Median annual earnings of year-round full-time workers 14 years and over by sex, 1955-75

Year	Annual earnings: Women	Men	Women's earnings as percent of men's
1955	$2,719	$ 4,252	63.9
1956	2,827	4,466	63.3
1957	3,008	4,713	63.8
1958	3,102	4,927	63.0
1959	3,193	5,209	61.3
1960	3,293	5,417	60.8
1961	3,351	5,644	59.4
1962	3,446	5,794	59.5
1963	3,561	5,978	59.6
1964	3,690	6,195	59.6
1965	3,823	6,375	60.0
1966	3,973	6,848	58.0
1967	4,150	7,182	57.8
1968	4,457	7,664	58.2
1969	4,977	8,227	60.5
1970	5,323	8,966	59.4
1971	5,593	9,399	59.5
1972	5,903	10,202	57.9
1973	6,335	11,186	56.6
1974	6,970	11,889	58.6
1975	7,504	12,758	58.8

NOTE: Data for 1955 to 1966 are for wage and salary workers only and exclude self-employed persons.

Table 38

Median annual earnings of women 14 years and over by weeks worked, 1975

Work experience	Annual earnings	Women's earnings as percent of men's
Total who worked at any time in 1975	$3,953	40.9
Worked at full-time jobs	5,853	53.6
50 to 52 weeks	7,504	58.8
27 to 49 weeks	4,551	59.4
26 weeks or less	1,291	62.3
Worked at part-time jobs	1,274	105.6
50 to 52 weeks	2,799	114.2
27 to 49 weeks	1,867	93.1
26 weeks or less	628	94.9

Table 39

Median annual earnings of year-round full-time workers in 1975, by selected characteristics, March 1976

Item	Number employed year round, full time (thousands)		Annual earnings		Women's earnings as percent of men's
	Women	Men	Women	Men	
Total, 16 years and over	17,451	37,255	$ 7,504	$12,631	59.4
Never married	3,516	4,657	7,522	8,849	85.0
Married, spouse present	9,972	30,023	7,483	13,334	56.1
Married, spouse absent	861	808	6,733	10,468	64.3
Divorced	1,933	1,404	7,922	12,321	64.3
Widowed	1,168	363	7,397	11,577	63.9
White	15,097	33,939	7,514	12,884	58.3
Black	2,036	2,768	7,237	9,710	74.5
Spanish origin	629	1,511	6,431	9,413	68.3
Years of school completed:					
Less than 12	3,194	8,871	5,682	10,040	56.6
12 only	8,392	14,139	7,103	12,260	57.9
16 or more	3,041	8,167	10,519	17,129	61.4

Item	Number employed year round, full time (thousands)		Annual earnings		Women's earnings as percent of men's
	Women	Men	Women	Men	
Occupation:					
Professional and technical	3,321	6,417	10,524	15,968	65.9
Managers and administrators, except farm	1,424	6,478	9,125	15,903	57.4
Clerical	7,166	2,453	7,562	12,136	62.3
Operatives, except transport	1,940	3,796	6,241	10,953	57.0
Service, except private household	2,275	2,637	5,414	9,491	57.0
In metropolitan areas[1]:					
Central cities	5,841	10,088	7,845	12,435	63.1
White	4,435	8,202	7,880	12,886	61.2
Black	1,234	1,602	7,584	10,640	71.3
Spanish origin	353	760	6,116	9,395	65.1
Suburbs	6,977	15,744	8,019	14,199	56.5
White	6,409	14,979	8,002	14,357	55.7
Black	452	538	7,989	10,224	78.1
Spanish origin	216	506	7,051	10,052	70.1

[1] Standard Metropolitan Statistical Areas.

Table 41

Earnings of married women, husband present, as percent of family income in 1975, by selected characteristics of husband-wife families, March 1976

Characteristic	Number of wives (thousands)	Median percent of family income accounted for by earnings of wife
Total, wives with earnings	23,709	26.3
Age of husband:		
Under 25 years	2,259	30.7
25 to 44 years	11,554	25.3
45 years and over	9,906	26.5
Wife worked 50 to 52 weeks full time	9,871	38.8
Family income:		
Under $10,000	841	59.5
$10,000 to $14,999	1,777	44.7
$15,000 to 19,999	2,466	39.2
$20,000 to $24,999	2,078	36.9
$25,000 and over	2,709	33.1
Median family income	$19,699	—
Wife worked 27 to 49 weeks full time	3,116	30.7
Wife worked 1 to 26 weeks full time or 1 to 52 weeks part time	10,722	11.8